Filed 10/5/12 In re D.M. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	E054522 (Super.Ct.Nos. J236831 & MJ20590) OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed.

Patrick McKenna, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

The Los Angeles County juvenile court found true the allegations that defendant and appellant D.M. (minor) committed second degree robbery (Pen. Code, § 211)[1] and assault with a deadly weapon (§ 245, subd. (a)(1)). The Los Angeles court found the robbery conviction constituted a strike. Minor was already on deferred entry of judgment in San Bernardino County during the instant case. Los Angeles County transferred the instant case to San Bernardino County. The San Bernardino County juvenile court ordered minor to serve 85 days in juvenile hall, with a stipulation that minor would earn early release if he took his high school equivalency test and was a "high pointer."

Minor raises three issues on appeal. First, minor asserts substantial evidence does not support the true findings for assault and robbery because the evidence connecting him to the crimes is too weak. Second, minor contends the Los Angeles court erred by denying minor's motion to exclude the victim's pretrial identification of minor, because the field show-up was unduly suggestive. Third, minor asserts there was insufficient evidence that the crutch used during the assault constituted a deadly weapon. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The victim worked as a delivery person for Domino's Pizza. On April 10, 2011, at approximately 10:30 p.m., the victim drove his car to a house on Peaceful Way in Lancaster to deliver two pizzas, a chicken, and a bottle of soda. The victim stopped his

[1] All subsequent statutory references will be to the Penal Code unless indicated.

car in front of the house. After exiting his car, the victim left the car unlocked because a delivery usually takes only two or three minutes. There were three pizzas for a different delivery in the victim's car.

The victim rang the doorbell at the house. As the victim waited a male appeared from the side of the house. The victim told the male, "Go get your mom. I'm here to make this delivery." The male responded, "Don't worry. Somebody is coming down to pick up the pizza." As the victim looked toward the garage, he saw approximately seven African-American males "coming out through the side of the house."

The males "got close" to the victim. One of the males had aluminum crutches, and struck the victim with one of the crutches. The victim was in shock and asked, "What happened?" The male then struck the victim a second and third time. The victim ran toward the front yard. The group of males followed the victim and formed a circle around him. The victim used his hands to try to block the strikes, but the person with the crutch struck him again. The victim saw another person had a second crutch and others had flashlights. The victim felt strikes all over his body coming "from all directions." The victim covered his face with his hands to try to protect it. The victim felt a crutch strike his head three times and strike his hands two times.

The victim struggled against the group. Eventually a person said, "Let's go." One of the people with a crutch said, "No, we have him already." The group then ran away, disappearing around the block. When the victim went to his car, he saw a briefcase was missing. The briefcase contained a portable DVD player, movies, personal papers, a security guard license, and a telephone charger. Also missing from

the car was soda and a blue Domino's pizza bag containing three pizzas. A neighbor called law enforcement.

Los Angeles County Sheriff's Deputy Ronald Carter responded to the neighbor's call on the night of the incident. Deputy Carter entered the home, and found it was vacant; it was listed for rent or sale, but people had been squatting in the house. When Deputy Carter exited the house, he saw a flashlight and a piece of an aluminum crutch in the front yard. The piece of the crutch was the bottom portion that can slide up or down to change the height of the crutch.

Los Angeles County Sheriff's Deputy Trevor Banks drove around the neighborhood looking for possible suspects. Deputy Banks saw minor and two other people on the front porch of a house. The house was approximately 250 to 300 feet away from the house where the incident took place on Peaceful Way. As the deputy drove by, minor ducked behind a pillar on the porch. The three people on the porch were the only people outside in the neighborhood. Deputy Banks called minor and the two other people to the curb and sat them down on the curb. Deputy Banks then searched the front porch area. The deputy found a portable DVD player leaning against the same pillar minor ducked behind. The deputy found cheese and tomato sauce on the concrete walkway leading to the porch, and a piece of pizza crust in a planter.

As minor and the two other people sat on the curb, Los Angeles County Sheriff's Deputy Sheldon Sherman searched the neighborhood. Deputy Sherman found a second vacant house on Rucker Street, approximately 500 feet from the house where minor was found. Deputy Sherman entered the house through an unlocked sliding glass door that

was ajar. Inside the house, Deputy Sherman found two pizza boxes on the kitchen bar and a delivery receipt reflecting the address on Peaceful Way where the incident occurred. The vacant house on Rucker Street was "a couple of blocks" from the vacant house on Peaceful Way.

Deputy Carter took the victim to the location where minor and the two other people were seated on the curb. The two other people were a male and female. Deputy Carter did not speak Spanish. The victim spoke Spanish and "broken English." Deputy Carter verbally admonished the victim about the field show-up in English, and the victim responded that he understood the admonishment. The victim viewed the three people while he was sitting in the back of a patrol car. Deputy Carter showed the three people to the victim one person at a time.

The victim recognized minor's clothing and facial piercing. The victim recalled a blue sweatshirt, blue jeans, a red belt, and a baseball cap. The victim recalled minor because he had been in close proximity to the victim. The victim also recalled a person wearing white who was "in charge" and giving orders. Deputy Carter showed the victim the DVD player found on the porch, and the victim identified it as his DVD player. The victim recognized the DVD player because the victim had previously broken it and repaired it with glue. The victim was also shown a thermal Domino's pizza bag that was found, and the victim identified it. Deputy Carter arrested minor, who at the time was wearing a blue sweatshirt, blue jeans, a red belt, and a black baseball cap. Minor had a piercing below his left eye. The victim did not recognize the two people who were with minor—the victim only identified minor.

Los Angeles County Sheriff's Detective Richard Cartmill spoke to minor on April 12, 2011. Detective Cartmill lied to minor, telling minor that minor's fingerprints were found on the pizza box. Detective Cartmill asked minor if minor's fingerprints would be on the other property found by the deputies. Minor admitted he "looked through the other items" and ate some of the pizza.

At the hearing, the victim did not recognize minor. The victim testified that he previously identified a person by his clothing, but the person did not having a facial piercing.

DISCUSSION

A. SUBSTANTIAL EVIDENCE

Minor asserts substantial evidence does not support the true findings, because the only evidence connecting him to the crimes is a "weak" and "tainted" identification by the victim. We disagree.

"Where the juvenile court has sustained a petition, an attack on the sufficiency of the evidence to support that ruling is governed by the substantial evidence rule. [Citation.] 'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment (order) to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the minor guilty beyond a reasonable doubt.' [Citation.] (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 577.)

Furthermore, "'[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.' (Evid.Code, § 411.) 'If a trier of fact has believed the testimony . . . this court cannot substitute its evaluation of the credibility of the witness unless there is either a physical impossibility that the testimony is true or that the falsity is apparent without resorting to inferences or deductions. [Citations.]' [Citation.]" (*In re Andrew I.*, *supra*, 230 Cal.App.3d at p. 578.)

The identity of the perpetrator of a crime is a question of fact for the trier of fact. (*People v. Rich* (1960) 177 Cal.App.2d 617, 625.) "[A] testifying witness's out-of-court identification is probative [for the purpose of establishing the minor's identity as the perpetrator of a crime] and can, by itself, be sufficient evidence of the [minor's] guilt even if the witness does not confirm it in court." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

Deputy Carter testified that he showed the victim three people during the field show-up. The victim only identified minor as one of his attackers. The victim identified minor by his clothing and facial piercing. Deputy Carter's testimony about the victim's out-of-court identification of minor is substantial evidence connecting minor to the offense. Further supporting the victim's assertion that minor participated in the crimes is (1) minor's admission that he touched the victim's belongings, and (2) the pizza ingredients and DVD player that were found near minor on the porch of the house. Given the foregoing evidence, we conclude substantial evidence connects minor to the crimes.

Minor asserts the victim's identification was unreliable because (1) the deputies showed the victim the DVD player and thermal pizza bag prior to the field show-up, thus implying that the people at the show-up were the attackers; (2) the victim testified he only partially understood Deputy Carter, due to the deputy speaking English, thus implying the victim did not understand the field show-up admonishment; and (3) the victim identified minor by his clothing, which implies the victim would have identified anyone wearing similar clothes to those worn by minor.

We find minor's first argument unpersuasive, because the victim only identified one of the three people at the field show-up as an attacker, which implies the victim understood not everyone at the field show-up was responsible for the crimes. Minor's second point is unpersuasive because the record reflects the victim told Deputy Carter he understood the admonishment, and this court cannot reevaluate the credibility of witnesses. Further, the testimony does not describe an impossibility, as the victim was able to recount statements made by his attackers, which were presumably made in English, thus reflecting the victim understands English. (See *People v. Elliott* (2012) 53 Cal.4th 535, 585 [evidence not substantial if it describes an impossibility].) Minor's third point is not persuasive because the victim identified minor by his clothing and his facial piercing. The addition of the facial piercing makes the victim's identification of minor more credible, because not only was minor wearing the same clothes, he had an uncommon identifying feature—a piercing beneath his left eye.

B. MOTION TO EXCLUDE

1. *FACTS*

At the conclusion of the jurisdiction hearing, minor's counsel moved to exclude any identification of minor due to the victim's out-of-court identification being tainted. Counsel argued (1) Deputy Carter failed to give the victim a written admonishment for the field show-up, which is contrary to Sheriff's Department policy; (2) a deputy told the victim the deputies found the suspects prior to the field show-up, thus implying guilt before the show-up; and (3) only one of the people at the show-up was wearing blue clothing.

Petitioner interjected by saying, "I'm sorry, I just have to inquire. Is this a motion or is this argument?" The juvenile court responded, "He made a motion. I'm not sure what the motion is, but I'm letting him finish his argument." Minor's counsel explained he was making a motion "to exclude the identification of [minor] based upon a tainted show-up."

The juvenile court said, "Since I'm the trier of fact, it's not a situation where we have to decide whether this is going to go back to the jury[.] You can argue it's a tainted show-up, and I'll consider that. [¶] . . . [¶] . . . But as to a formal motion, I don't have to say to you, [minor's counsel], your motion to exclude is granted. I don't believe I have to do that." Minor's counsel responded, "*I didn't ask you to do that*; I'm just arguing my motion. I'm saying it's tainted. For all of the reasons that I stated above, it's tainted." (Italics added.) Minor's counsel continued—giving his closing argument.

After minor's counsel concluded his closing argument, Petitioner began its closing argument. At the beginning of Petitioner's argument it said, "With attention to the ID issue, and again, I'm not clear whether there was a motion or whether it was just argument, the victim did testify that he was admonished." Petitioner went on to complete its closing argument. Minor's counsel asked the juvenile court if he could "comment on a couple of [Petitioner's] argument[s]." The juvenile court said argument had concluded, unless minor's counsel wanted to provide information about a question the court had concerning lesser included offenses. Minor's counsel responded, "All right," and then the court rendered its findings.

2. *ANALYSIS*

Minor asserts the juvenile court erred by (1) not ruling on the motion to exclude any identification of minor, and (2) not granting the motion to exclude. We disagree.

We first address the juvenile court's alleged failure to rule on the motion. If a court, through inadvertence or neglect fails to rule on a motion or reserve its ruling, then """the party who objected must make some effort to have the court *actually rule*. If the point is not pressed and is forgotten, he may be deemed to have waived or abandoned it, just as if he had failed to make the objection in the first place."""" (*People v. Brewer* (2000) 81 Cal.App.4th 442, 459.)

The juvenile court and Petitioner were confused by minor's counsel's argument. The juvenile court did not understand minor's counsel's motion, and Petitioner was unsure if minor's counsel raised a motion at all. When the juvenile court stated it did not believe it needed to render a ruling on the motion, minor's counsel responded, "I

didn't ask you to do that." Given minor's counsel's statement that he was not asking for a ruling, we do not fault the juvenile court for not rendering a ruling. If minor's counsel wanted a ruling on the motion to exclude, then he needed to make an effort to obtain a ruling. (*People v. Brewer*, *supra*, 81 Cal.App.4th at p. 459.) In sum, we conclude the juvenile court did not err by not rendering a ruling.

To the extent the juvenile court denied the motion, we conclude the juvenile court did not err. """In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) 'whether the identification procedure was unduly suggestive and unnecessary,' and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1162-1163.) We apply the independent standard of review. (See *People v. Boyer* (2006) 38 Cal.4th 412, 477 ["independently conclude"].)

As to the identification procedure, a """single person showup" is not inherently unfair.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 413, fn. omitted.) An identification procedure is unfair when it suggests in advance to the witness the identity of the person suspected by law enforcement. (*Ibid.*) "The burden is on the [minor] to demonstrate unfairness in the manner the show-up was conducted, i.e. to demonstrate that the circumstances were unduly suggestive. [Citation.] [Minor] must show unfairness as a demonstrable reality, not just speculation. [Citation.]" (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.)

The victim testified a detective took him to the field show-up and told him that deputies "found three people with the Domino's pizza bag, and they found also the DVD player." The victim recalled being told the three people "may or may not have been involved in this incident." Deputies showed the victim two males and a female, one at a time. The victim only identified minor—he did not identify the other two people. The victim identified minor by minor's clothes and facial piercing. The victim recalled minor's blue sweatshirt, blue jeans, red belt, baseball cap, and piercing on the side of his face. Deputy Carter could not recall what color clothes the other two people at the show-up were wearing. Deputy Carter believed only minor was wearing blue clothing.

The procedure used for the field show-up was not unduly suggestive. A deputy told the victim the people may or may not have been involved in the attack, and the victim only identified one of the three people involved, which suggests the victim understood the admonishment. As to minor possibly being the only person wearing blue clothing, there is no requirement that only similarly dressed people be placed in a show-up. Rather, the point is that a suspect not be placed in a lineup in such a manner as to make his identification a virtual certainty. (*People v. Cunningham* (2001) 25 Cal.4th 926, 990.) Since it is unclear exactly what clothing the other two people were wearing, (e.g., the other two people were wearing suits while minor was wearing jeans), it does not appear the show-up proceeded in such a way to make it a virtual certainty minor was identified.

Moreover, the purpose of a field show-up is to obtain a reliable identification close in time to the crimes, so the images are fresh in the victim's mind, and because it helps law enforcement to have an immediate answer as to whether the correct person has been apprehended. (*In re Carlos M., supra,* 220 Cal.App.3d at p. 387.) If the deputies had taken time to find other people in blue clothing, or obtain different clothing for minor, then the identification procedure could have become problematic due to a lapse in time between the crimes and the show-up. In sum, the identification procedure was necessary and not unduly suggestive.

Next, we determine whether the identification was reliable given the totality of the circumstances, which includes considering (1) the victim's opportunity to see the suspect during the crime; (2) the victim's degree of attention during the crime; (3) the accuracy of the victim's prior description of the suspect; (4) the level of certainty demonstrated at the time of the identification; and (5) the lapse of time between the crime and the identification. (*People v. Johnson* (2010) 183 Cal.App.4th 253, 271.)

As to vision, the victim said minor was standing approximately three feet away from him during the attack; however, it was dark outside. The victim saw minor's clothes, and "something shiny" on his face. In regard to the degree of attention during the crime, the victim saw the group of males approach him, and after the victim was struck he ran towards the front yard where the males surrounded him. Thus, the victim had an opportunity to see the attackers prior to being struck multiple times. The victim also saw the attackers during the battery.

As to the accuracy of the description, the victim told Deputy Carter a person involved in the attack was wearing a blue sweatshirt, blue pants, red belt, and a baseball cap. When minor was booked into custody, he was wearing a blue sweatshirt, blue jeans, and red belt. Minor also had a black baseball cap with him. Thus, the victim's description appeared accurate. In regard to the level of certainty demonstrated at the time of the identification, the victim recognized minor's clothes and recalled minor's facial piercing. Deputy Carter told the victim not to guess and to only give concrete answers, to which the victim responded minor was the only one of the three people he could identify. Given the deputy's admonition, it appears the victim's identification was certain. Finally, as to the time that elapsed, the field show-up occurred approximately 10 minutes after the crimes. Thus, a short period of time took place between the crimes and the identification.

Given the victim's opportunity to see minor during the crime; the victim's ability to pay attention to the males prior to being attacked and during the attack; the victim's accurate description of minor's clothing; the victim's level of certainty at the time of the identification; and the brief lapse of time between the crime and the identification, we conclude the totality of the circumstances reflects the victim's out-of-court identification was reliable. Thus, we conclude the juvenile court did not err to the extent the juvenile court denied minor's motion to exclude.

Minor asserts the field show-up was unduly suggestive because (1) a deputy told the victim that the victim would be taken to identify the people who assaulted him, thus implying guilt; and (2) a deputy showed the victim the thermal pizza bag and DVD

player prior to the field show-up, thereby impermissibly linking the suspects to the crime. We find minor's argument unpersuasive because the victim only identified one of the three people shown to him. If the victim were confused or the deputies tainted the victim's identification with impermissible suggestions, it would be reasonable for the victim to have identified both of the males at the show-up as his attackers, but the victim said he only recognized minor, which implies the victim understood the people at the show-up might not have been involved in the crimes.

Minor asserts the totality of the circumstances do not support the finding of a reliable identification because (1) the victim was covering his face during the battery, thus limiting his ability to see the attackers; (2) the victim could only identify the clothing of two of the seven assailants, thus indicating the victim had a limited opportunity to see the attackers; (3) the record does not set forth the victim's preshow-up description of the suspects; and (4) the victim could not identify minor in court.

We do not find minor's first point to be persuasive because the victim saw the males prior to being attacked, so the victim could have seen minor prior to covering his face. Minor's second point is not convincing because the victim described other people in the group as young, African-American, and wearing white caps and black caps. Thus, the victim was able to provide a brief description of the other attackers. Minor's third point, concerning the pre-identification description, is not persuasive because when Deputy Carter testified on direct examination, the following exchange occurred:

"[Petitioner]: Is your report accurate, to the best of your recollection?

"[Deputy Carter]: Yes.

"[Petitioner]: So what clothing did he describe that you recall?

"[Deputy Carter]: A blue sweatshirt, blue jeans, red belt, a baseball cap.

"[Petitioner]: Do you recall the color of the baseball cap?

"[Deputy Carter]: Black.

"[Petitioner]: And is that what [the victim] told you [was] the reason why he recognized that person?

"[Deputy Carter]: Yes.

"[Petitioner]: And you mentioned a facial piercing?

"[Deputy Carter]: Yes.

"[Petitioner]: What do you recall [the victim] telling you about that?

"[Deputy Carter]: He recognized his facial piercing. When we were doing the field show-up the person that was shown was in front of the radio car with a spotlight on due to the nighttime. He stated that he had remembered that there was something shiny on the side of the person's face."

Deputy Carter testified that the victim "described" minor's clothing, not that he "recalled" or "recognized" the clothing. Thus, it can be inferred from the testimony that the victim described minor's clothing to the deputy prior to the field show-up. Further, we note that minor asserted, in a separate argument, that the show-up was tainted because he was the only person wearing blue clothing, which suggests minor believes the deputies received a description of minor's clothing prior to the show-up.

Minor's fourth point about the in-court identification is not persuasive because the victim was always consistent about identifying minor by his clothing. At the hearing, minor was wearing an orange jumpsuit—not the blue clothing from the night of the crimes. Accordingly, it was logical that the victim could not identify minor in court; however, that does not mean the victim was unable to identify minor 10 minutes after the attack during the field show-up.

C. DEADLY WEAPON

Minor asserts there is insufficient evidence that the crutch used during the assault constituted a deadly weapon. (§ 245, subd. (a)(1).) We disagree.

The substantial evidence standard is set forth *ante*, so we do not repeat it here. Various items may, upon sufficient proof, be deemed instruments of the crime of assault with a deadly weapon. (§ 245.) "It is established that 'objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]' [Citations.]" (*In re David V.* (2010) 48 Cal.4th 23, 30, fn. 5.) For example, a cane could be a deadly or dangerous weapon. (*In re Bartholomew D.* (2005) 131 Cal.App.4th 317, 323.)

The evidence reflects the victim's body was beaten, including his head, with aluminum crutches and possibly flashlights. Deputy Carter found the bottom portion of one of the crutches that slides up and down to adjust the height of the crutch, in the front yard after the attack. The trier of fact could infer the crutch blows were so severe that

the bottom crutch piece separated from the force of the impact. At the hearing, the victim testified a "blow" to his leg was still visible; the hearing took place approximately two months after the attack. The victim felt a crutch strike him five times, including three hits on his head.

From the foregoing evidence, the juvenile court could reasonably conclude the crutch was being used to deliver powerful strikes to the victim's head. The circumstance of forcefully beating a person's head with an aluminum crutch causes the crutch to be an object likely to produce death. Thus, we conclude substantial evidence supports the conclusion that the crutch was a deadly weapon.

Minor cites *People v. Beasley* (2003) 105 Cal.App.4th 1078 to support his argument that the crutch was not a deadly weapon. In *Beasley*, the appellate court considered whether striking a person's arms and shoulders with a broomstick caused the broomstick to be a deadly weapon. (*Id*. at p. 1087.) The appellate court reasoned that a broomstick could be a deadly weapon if used to strike a person's face or head, but not a person's arms and shoulders. The appellate court also took issue with the lack of evidence concerning the force used to strike the victim with the broomstick, as well as the lack of evidence concerning the composition of the broomstick, e.g., wood, plastic, metal. (*Id.* at pp. 1087-1088.) The appellate court concluded the evidence was insufficient to show the defendant used the broomstick as a deadly weapon. (*Id.* at p. 1088.)

We find the instant case distinguishable from *Beasley* because the record in the instant case reflects the crutch was made of metal, it was used to strike the victim's

head, and a piece of the crutch was found in the yard indicating great force was used while striking the victim. *Beasley* lacked similar evidence concerning blows to the head, the level of force, and the composition of the object. Thus, we find minor's reliance on *Beasley* to be unpersuasive.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.